United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

22,137

583

MICHAEL DALE THORTON,

Appellant

-vs-

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATUTES INVOLVED

Title 18, United States Code, Section 3481 (62 STAT 833):

> In trial of all persons charged with the commision of an offense against the United States and in all

proceedings in Court Martials and courts of inquiry in any state, possession or territory, the person charged should, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him.

ISSUES PRESENTED

I. THE DELAY BETWEEN THE OFFENSE AND THE ARREST OF THE APPELLANT OCCASIONED BY THE LACK OF DILIGENCE BY THE POLICE AND RESULTING PREJUDICE TO THE DEFENDANT HAS DENIED THE APPELLANT DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT.

II. THE TOTAL DELAY BETWEEN OFFENSE AND TRIAL OF THE APPELLANT OCCASIONED BY THE LACK OF GOVERNMENTAL DILIGENCE VIOLATED APPELLANT'S RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT.

III. REMARKS MADE BY PROSECUTING ATTORNEY IN HIS CLOSING ARGUMENT TO THE JURY WERE IMPROPER AND WERE VIOLATIVE OF DUE PROCESS.

THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS COURT UNDER THE SAME OR ANY SIMILAR TITLE.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

22,157

MICHAEL DALE WHORTON,

Appellant

-vs-

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

The Appellant, Michael Dale Whorton, was indicted for offenses under 22 District of Columbia Code, 2901, 502. The jury returned a verdict of guilty as charged; and upon this said conviction, the appellant received an imprisonment for a period of twelve years on one count and ten years on the second count to run concurrently under the provisions of the Federal Youth Corrections Act, Title 18, U. S. Code,

Section 5010-C. The jurisdiction of this court is invoked under Title 28, U. S. Code, Section 1291.

STATEMENT OF THE CASE

On April 7, 1967, at approximately 8:45 P. M., two Negro males committed an armed robbery of a Safeway Store, located at 1731 Seventh Street, N. W., District of Columbia. The appellant, then 19 years old, was arrested for this robbery on December 12, 1967 and was tried and convicted by May 2, 1968 in the United States District Court for the District of Columbia.

The robbery occurred while the store manager, Mr. John B. Nebel, was in the process of placing money in a bank bag for deposit. Two flashily dressed young men wearing sunglasses entered the store and appeared to be searching for change for purchasing cigarettes from a machine located in the rear of the check-out stands and only feet away from the manager's office (Tr. 267). There was a tapping upon the glass window cut into the partition of the manager's office and one of the men, armed with a revolver, demanded the money from Mr. Nebel, who placed it into a brown paper bag furnished by the robber (Tr. 269). The second robber was standing behind the first, also armed with a revolver (Tr. 271) or a "dark stick" (Tr. 243). During the course of these events, a Mr. Harold

S. Chichester, produce manager of the store who was acting as a counter cashier at the time of the robbery, and, in fact, was in the process of checking out a two-part order for a customer (Tr. 231, 238). The total elapsed time from entry to departure was around 2 minutes (Tr. 163).

Shortly after the robbery, the appellant was tentatively identified as one of the robbers by Nebel and Chichester, on the basis of black and white photographs (Tr. 128, out of presence of the jury, and Tr. 250) taken in September of 1965, and shown to them by the investigating detective (Tr. 106, out of presence of the jury). The circumstances of this viewing are unclear (compare Tr. 167 and 129, out of presence of the jury, with Tr. 249); the investigating detective testified that Nebel and Chichester viewed the photographs separately (Tr. 129), Nebel testified that both he and Chichester viewed together, (Tr. 167, out of presence of the jury) while Chichester testified that they were separate (Tr. 249).

The day following the robbery, the robbery victims viewed polaroid colored mug shots at the RobberySquad office, and made identification of appellant (Tr. 131, out of presence of the jury). All attempts to identify the other robber failed

(Tr. 108, out of presence of the jury) and, in fact, when identifications made by the robbery victims of the second man were verified, all those identified were found to have been in jail at the time of the robbery (Tr. 173, out of presence of the jury). No steps were then taken to insure an early notice of arrest to appellant and there were no efforts made by the police to arrest the appellant on the basis of this identification (Tr. 124, out of presence of the jury) until May 23, 1967, when the investigating detective swore out a complaint and caused a warrant for the arrest of the appellant to be issued (Tr. 284). The detective then had a general police lookout broadcasted for the appellant (Tr. 125, out of presence of the jury), and "three or four days" after the warrant issued, paid a visit to appellant's Mother and left his card for the appellant to call (Tr. 125-126, out of presence of the jury).

At this time, the appellant had been arrested for another charge on May 20, 1967 and had been released on bond on his own recognizance and in his Mother's custody (Tr. 130, out of presence of the jury). The investigating detective had knowledge of this other arrest (Tr. 136, out of presence of the jury), but did not go to the courthouse to check the trial

docket (Tr. 136, out of presence of the jury). His singular attempt was to telephone the Clerk of the Court for information as to when the appellant would be present at court (Tr. 136, out of presence of the jury). The appellant, having been indicted by the grand jury (GJ 536-67) on 23 May 1967, was physically present in the Court of General Sessions for arraignment on a grand jury indictment on June 2, 1967 (Tr. 180, out of presence of the jury) when he was again released on bail (Criminal No. 624-67). During the period of time between the offense and the arrest, the appellant was employed at the Eastern Delicatessen in the District of Columbia and at Ace Construction Company, located in the District with job sites in Maryland (Tr. 202, out of presence of the jury).

There were no further attempts made by the police to serve the warrant of arrest other than the general police lookout and the detective's visit to the appellant's Mother shortly after the warrant had issued, previously mentioned.

On December 12, 1967, around 1:00 or 2:00 A. M., the appellant was brought into the Ninth Precinct of the Metropolitan Police for a violation of the Traffic and Motor Vehicle Regulations (Tr. 109, 182, 186 out of presence of the jury). At that time, the appellant failed to initially

identify himself since he had been driving without a permit, but rather used the name of Willie Lee Stewart (Tr. 182, out of presence of the jury, and Tr. 292), whom the appellant knew had a valid permit. There is some question as to whether or not tha appellant gave a further alias (compare Tr. 183, out of presence of the jury, with Tr. 292). Because of the inability of the police at the Ninth Precinct to properly identify the appellant, they notified the Robbery Squad around 4:30 A. M. (Tr. 109, out of presence of the jury, and Tr. 293).

The investigating detective testified from notes in a preliminary hearing at trial out of the jury's presence, that upon his arrival at the Ninth Precinct at 4:45 A. M., he was able to immediately identify the appellant and call out his name (Tr. 110, out of presence of the jury). He further stated, that he told the appellant that he had a warrant for his arrest for the robbery of the Safeway Store (Tr. 141, out of the presence of the jury), and a bench warrant for "jumping bond" (Tr. 142, out of presence of the jury) and, then, verbally gave him the Miranda warnings, as well as showed him a Police Department form (PD 47) containing the Miranda warnings and had the appellant read PD 47 (Tr. 110, 116, 117, out of presence of the jury). Following these events the

appellant was then transferred to the Robbery Squad arriving there around 6:00 P. M. (Tr. 142, out of presence of the jury).

At the Robbery Squad, as the investigating detective testified, PD 47 was again read to the appellant and he was asked to sign another police department form (PD 54), a card containing the Miranda warnings, and stating that he had been so warned (Tr. 121, out of presence of the jury). He was then told about the lineup (Tr. 118, out of presence of the jury) and that the appellant had no objections to such a lineup because he had not committed the robbery (Tr. 119, out of presence of the jury).

Appellant's testimony, however, showed substantial disagreement with that of the investigating detective. Appellant testified that he was advised only of a warrant for jumping bond (Tr. 185, out of presence of the jury) in connection with Criminal Number 624-67. The appellant further stated, that he had not been warned of his rights either verbally or by a reading of PD 47 (Tr. 185, out of presence of the jury), and, in fact, had not been told of the Safeway robbery (Tr. 186, out of presence of the jury) until just prior to the lineup. Appellant's testimony indicated that his first advisement of his rights, including that of his right

to counsel, was given after the lineup had been completed (Tr. 187, out of presence of the jury), and then he signed PD 54 (Tr. 202, out of presence of the jury), and was then charged for the crime (Tr. 183, out of presence of the jury). The appellant had not requested an attorney prior to that point because he felt he did not need one on a bail jumping charge, and that he would have an attorney the following morning at preliminary hearings. Additionally, he was unconcerned for he had not committed the crime (Tr. 116, 119, 200, 201, out of presence of the jury).

The lineup, itself, was conducted in the Robbery Squad office at 9:22 A. M., some seven to eight and one half hours after arrest (Tr. 122, and 122 out of presence of the jury). In addition to appellant, four young Negro policemen were present in the lineup (Tr. 122, out of presence of the jury). The appellant was identified by Mr. Nebel, who had responded to a telephone call from the investigating detective (that we did arrest the subject whom he had prior identified by a photograph as the subject that held up the Safeway store" (Tr. 144, out of presence of the jury), and to come down and view the lineup. Nebel also testified that his identification of appellant at the lineup further supported his previous identifications of the appellant by photographs (Tr. 174,

out of presence of the jury).

The appellant was indicted for robbery and assault with a dangerous weapon by the Grand Jury on January 31, 1968, (GJ 1964-67) an attorney was appointed on February 5, 1968, and a plea of not guilty (Criminal No. 107-68) was entered on February 16, 1968. On April 26, 1968 appellant's motion to dismiss the indictment for lack of a speedy trial was denied by Judge John Sirica. Trial was begun on April 30, 1968, at which time the motion to dismiss for lack of speedy trial was renewed and denied by Judge John Lewis Smith.

A Miranda-type hearing was held prior to trial, and testimony from the investigating officer, Mr. Nebel, and the appellant was given out of presence of the jury. Appellant's motion to suppress in-court identification was denied (Tr. 213, out of presence of the jury).

In his closing argument, the government's attorney indicated that the evidence was uncontradicted (Tr. 348, 349 and 351). Neither the defendant, nor any witnesses on his behalf, testified. (TR. 297).

On May 2, 1968, the jury returned a verdict and found the appellant guilty as indicated, and on June 14, 1968, appellant was sentenced under the provisions of the Federal Youth Corrections Act, Title 18, U. S. Code, Section 5010-C

to a concurrent term of twelve (12) years on Count One and ten (10) years on Count two.

Notice of Appeal was filed on June 17, 1968, and granted on June 27, 1968, and by order of this Court, counsel was appointed on July 31, 1968.

SUMMARY OF ARGUMENT

I. The delay occurring between offense and arrest of the appellant was arbitrary and without justification or commendable purpose on the part of the police and was, further, prejudicial to the ability of the appellant to defend himself at trial thereby denying appellant of due process of law.

II. The delay occurring between offense and trial was arbitrary and oppressive and was not, in any way, attributable to the appellant, but rather, to the lack of police diligence amounting to negligence. The appellant has been prejudiced by the delay by his inability to present a defense and has, therefore, been denied of the constitutional command of his right to a speedy trial.

III. The comments made by the government's attorney during his closing arguments to the effect that various testimony was uncontradicted was an indirect reference to the failure of the appellant to testify or to call witnesses on his behalf. Such comments were prejudicial to the appellant and could not be cured by any latter instruction to the jury.

I. THE DELAY BETWEEN THE OFFENSE AND THE ARREST OF THE APPELLANT OCCASIONED BY THE LACK OF DILIGENCE BY THE POLICE AND RESULTING PREJUDICE TO THE DEFENDANT WAS DENIED THE APPELLANT DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT.

So long as a defendant was apprehended within the period of time prescribed by the statute of limitations, it has been held that neither the Sixth Amendment nor Rule 48(b) of the Federal Rules of Criminal Procedure is applicable in a situation where delay occurs between the commission of a criminal act, the issuance of a warrant and the arrest of the defendant. Nickens v. United States, 116 U.S. App. D. C. 338, 340, 323 F.2d 803, 813, cert. denied 379 U.S. 905 (1963). Even so, this court noted in Note 2 of that case, at page 340: "This is not to suggest that the delay between offense and prosecution could not be so oppressive as to constitute a denial of due process." Accord, Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964), cert. denied 380 U.S. 984. Judge Wright, in the concurring opinion of Nickens, supra., stated at page 342:

> That the delay in doing justice in this case occurred between offense and formal complaint,

> rather than between complaint and indictment or indictment and trial, does not immunize it from Constitutional command. The right of a suspect to a speedy determination of guilt or innocence is not lost merely because the delay in the process occurs before the formal charge, rather than after.

Constitutional rights cannot depend upon the terms of a statute, Nickens, supra. at 342, and this court in Mann v. United States, 113 U.S. App. D. C. 27, 29-30, 304 F.2d 394, cert. denied 371 U.S. 895 (1962), has removed from consideration the statute of limitations as to the determining factor where "the delay is purposeful or oppressive...(then) even an indictment within the statute of limitations period may come too late to square with the Sixth Amendment." And in Powell v. United States, 122 U.S. App. D. C. 229, 231-232, 352 F.2d 705 (1965), it was stated that "the issue here is not the outer limits of time period in which a prosecution may be initiated but about the problem of to what extent and under what circumstances, police may delay making an arrest once they have sufficient knowledge of a crime to support the arrest of a given individual for that crime."

In Ross v. United States, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965), this court considered a due process analysis of the delay between offense and arrest as "centering around the defendant's ability to defend himself," Ross, supra. at 235. The defendant must be given prompt notice where he is faced with the loss of his liberty by reason of criminal charges, and if not, severe prejudice may result. Ross, supra. "Where delay to serve the interests of the public occurs, with the inevitable impact upon the interests of the accused, there is an obligation on the police to be as diligent as possible in making the arrest, to the end that the accused may know as soon as possible the charges against him." Godfrey v. United States, 123 U.S. App. D. C. 219, 221, 358 F.2d 850 (1966) (Emphasis added).

Where the delay is lengthy, prejudice may be presumed, Hanrahan v. United States, 121 U.S. App. D. C. 134, 348 F.2d 363 (1965); Jackson v. United States, 122 U.S. App. D. C. 124, 351 F.2d 821 (1965); and, there is no need to prove prejudice beyond a reasonable doubt or by a preponderance of evidence but it is necessary to establish "a plausible claim of inability to recall or reconstruct the events of the day of the offense." Jackson, supra. at 125; or, the "likelihood or at least a reasonable possibility, that defendant has been

prejudiced by delay." Hedgepeth v. United States, 124 U.S. App. D. C. 201, 204, 364. F.2d 604 (1966). Establishing elements of prejudice is extremely difficult due to the general inability of a defendant to recall the particularized events of a day at sometime in the past. This inability renders the defendant useless in assisting in his own defense. If he cannot recall the day, then he cannot know what witnesses could verify his presence at a particular locality, or his appearance, or his manner of dress, or any other material fact in support of his general denial. This court in Ross v. United States, supra. recognized this difficult handicap: "In a very real sense, the extent to which (the defendant) was prejudiced by government delay is evidenced by the difficulty he encountered in establishing with particularity the elements of his prejudice."

In narcotics delay, the court is faced with striking a balance between police efficiency and public interest, and the "separate interests in fair procedures for the citizen." Ross, supra. at 235. Accord: Woody v. United States, 125 U.S. App. D. C. 192, 370 F.2d 214 (1966); Godfrey v. United States, supra.; Smith v. United States, 119 U.S. App. D.C. 28, 331 F.2d 784 (1964). These fair procedures include the right to early notice of impending criminal charges and diligent efforts

on the part of the police to bring such notice and ensure fair procedures, Powell v. United States, supra.

The delay on the part of the police in apprehending the narcotics suspect may be excused and may be in the public interest by not forcing the police to reveal the identity of its undercover agent thus permanently losing his effectiveness. However, where, as in this case, narcotics are not involved, the public interest lies in an early arrest and there is no impingement of the public interest which requires an accommodation between that interest and fair procedure to the citizen. The greater the risk to the public, the greater the police efforts should be to reduce that risk and shorten the allowable time for delay. Woody v. United States, supra.

A warrant for the arrest of the appellant was issued on May 23, 1967 for offenses committed on April 7, 1967 after an identification deemed positive by the police on April 8, 1967, at which point, the government had its total case. This warrant was not executed until December 12, 1967, and then only by happenstance. The police failed to meet their obligation to be as diligent as possible in making the arrest so that the accused may know as soon as possible the charges against him. Powell v. United States, supra. This failure to execute the warrant was further unconscionable in light of the fact that the appellant was voluntarily before the

United States District Court for the District of Columbia on June 2, 1967 in connection with Crim. No. 624-67, ten days after the complaint in this case had issued. The investigating detective had full knowledge of this other matter but failed to check or have checked, the records of the Court, his only attempt being a single telephone call to the Clerk of the District Court. Surely, due process requires a greater obligation of the police when they have knowledge of an offender's impending presence before a judicial body.

Additionally, a check into Crim. No. 624-67 would have indicated to the police officer the appellant's address, place of employment and other information establishing his ties to the community which information appellant gave to obtain release on his own recognizance in the custody of his Mother. During the entire period from April 8, 1967 until December 12, 1967, the appellant was a resident of and employed within the District of Columbia. The only attempt by the police which could have notified the appellant of these charges was made sometime around May 26, 1967 when the investigating detective called upon the appellant's Mother at her home and left his card for the appellant to call. In any case such notice could not be construed as notice to appellant which is required by due process. Appellant's Mother was not advised

as to the time and place of the alleged robbery.

Further, the Government's failure to inform the appellant of the charges against him in this case for a period of over eight months when it had every opportunity to do so, has deprived him of an opportunity to properly prepare his defense when his memory of his activities on the date of offense was still fresh:

> Indeed, a suspect may be at a special disadvantage when complaint, or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense." Wright, Cir. J. concurring in Nickens v. United States, supra.

The prejudice to the appellant has been substantial, and accordingly, he has been deprived of an opportunity to have a fair trial. c.f. Woody v. United States, supra.; Godfrey v. United States, supra.; Powell v. United States, supra.; Ross v. United States, supra.

The burden lies upon the Government to prove that the police acted with due diligence in safeguarding appellant's fair procedures, that his due process rights have not been abridged, that the delay was justifiable, and that there has

been no serious prejudice to the appellant. Hanrahan v. United States, supra.; Williams v. U.S 102 U.S. App. D. C. 51, McNeill v. U. S.,-U.S. App. D.C.-,-F.2d-,No. 21, 570 dec.6/4/68.

There has been no legitimate reason for the delay which has occurred in this case. The delay has no commendable purpose, and although it may not have been done in "bad faith or chicanery, it is enough if the Government has made a deliberate choice for a supposed advantage which caused as much oppressive delay and damage to the appellant as it would have caused had it been done in bad faith." United States v. Parrott, 248 F Supp. 196, 203 (D.D.C. 1965); Petition of Provoo,17 F.R.D. 183, 202 (D. Md.) affirmed per curriam, 350 U.S. 847 (1955). And, the delay may also be considered so negligent as to warrant reversal of appellant's conviction. Hedgepeth v. United States, supra.

The Government cannot meet the burden set out in Hanrahan, supra. There could be no commendable or legitimate reason for the delay in the early notice or arrest, and that substantial prejudice has resulted directly from this delay. The due process rights of the appellant have been violated, as well as a denial of his right to a fair trial, and this requires reversal in the instant case.

II. THE TOTAL DELAY BETWEEN OFFENSE AND TRIAL OF THE APPELLANT OCCASIONED BY THE LACK OF GOVERNMENTAL DILIGENCE VIOLATED APPELLANT'S RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT.

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." This constitutional command is necessarily relative, and whether delay in prosecution amounts to an unconstitutional deprivation of rights depends on whether "the delay has been arbitrary, purposeful, oppressive or vexatious." Smith v. United States, 119 U.S. App. D.C. 38, 41, 331 F.2d 734, 787 (1964); Evans v. United States, ___ U. S. App. D. C. _____, ____. F.2d____, Nos. 20,430 and 20,431, decided May 3, 1968. The majority in Marshall v. United States, 119 U.S. App. D. C. 33, 36, 337 F.2d 119, 122 (1964) stated: 'Though the delay was not purposeful in any meaningful sense, much of it was arbitrary, and in the aggregate it was oppressive and vexatious." C.F., Pollard v. U.S.,352 U. S.354(1957) Mann v. United States,supra.

"There is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment." Hedgepeth v United States, 124 U.S. App., D. C. 291, 294, 364 F.2d 684 (1966). Whether there has been a

denial of the right to speedy trial depends upon the circumstances of each case. Factors to be considered are: (1) the length of the delay; (2) reasons for the delay; (3) diligence of prosecutor, court and defense counsel; and, (4) reasonable possibility of prejudice from the delay. Dockery v. United States, 129 U.S. App. D. C. 243, 393 F.2d 352 (1960); Hedgepeth v. United States, supra., United States v. Lustman, 250 F.2d 475, 478; Bond v. United States, 233 A.2d 506 (D.D.C. 1967).

In Bond v. United States, supra., the court utilized the Hedgepeth criteria in measuring the Sixth Amendment right to speedy trial from the time of the offense or when the Government had knowledge of the offender's identification to the date of trial. The court held that the total elapsed time between offense and trial violated the command of the Sixth Amendment even though the time between charge and trial was not necessarily unreasonable. "In this jurisdiction, however, the entire period between offense and trial may be considered" Bond, supra at 511 citing Mann v. United Stated , 113 U.S. App. D. C. 27, 29-30 N. 4, 304 F.2d 394, 396-397 N. 4, cert. denied, 371 U. S. 896 (1962). C.f. Hanrahan v. United States, 121 U. S. App. D. C. 134, 348 F.2d 363 (1965); Hedgepeth v. United States (HEDGEPETH I), supra.

Prejudice to a defendant may not always be clearly shown. Memories dim, witnesses are not brought to light simply because they cannot be determined. See Ross v. United States, supra. It is only necessary that there is a "likelihood or at least a reasonable possibility, that defendant has been prejudiced by delay." Hedgepeth v. United States, supra at 294; accord, Jackson v. United States, supra; and Hanrahan v. United States, supra. The Bond court further stated at 512:

> Where the delay is substantial, prejudice is presumed and to overcome this presumption the government has the burden of proving that there was no more delay than is reasonably attributable to the ordinary processes of justice and that the accused suffered no serious prejudice thereby. There is no clear indication of the strength of the presumption or length of time which will be considered "substantial." When the delay is less than "substantial," although purposeful, oppressive or negligent, at least some showing of a strong possibility of prejudice is required.

A period of delay from arrest to trial which excceds a year

raises a claim of prima facie merit. Harling v. United States,____ U. S. App. D. C._____,_____F.2d____, Nol 21,345, decided June 27, 1960, 96 WLR 1169. A period of delay from offense to trial should be of equal merit. Whether the delay occurs at one point in the total process, rather than at another, can result in the same consequences at trial. The dangers present, in terms of prejudice to a defendant, are perhaps greater when the delay occurs before arrest or notification of the charges. In this situation, a citizen would have little reason to recall particularized events of some distantly past day in order that he might have ready alibis and witnesses for the highly unlikely event that he may at some day in the future be on trial for his liberty.

III. REMARKS MADE BY PROSECUTING ATTORNEY IN HIS CLOSING ARGUMENT TO THE JURY WERE IMPROPER AND WERE VIOLATIVE OF DUE PROCESS.

The duty of a prosecuting attorney is not necessarily to convict a defendant, but rather to ensure a fair trial. McFarland v. United States, 80 U.S. App. D. C. 196, 150 F.2d 593 (1945), cert. den. 66 S.C. 472, rehearing den. 66 S.C. 526; Berger v. U. S. 295 U.S. 78. "It has been said that it is much of the duty of a prosecuting attorney to see that a person on trial is not deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime with which he

may be charged." 42 Am. Jur.Prosecuting Attorneys, § 20.

The constitutional privilege of a defendant against self-incrimination and its corollary, the prohibition against prosecutorial comment on a defendant's exercise of that right by not testifying, must be enforced by the courts. Tomlinson v. United States, 68 U.S. App. D.C. 106, 93 F.2d 652, 114 A.L.R. 1315 (1938), cert. den. 58 S.C. 645, Milton v. United States, 71 U.S. App. D.C. 394, 110 F.2d 556 (1940); Van Storey v. United States, 77 A.2d 318 (1951). " There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18 (1967)

In Wilson v. United States, 149 U.S. 60 (1893) the Court stated: "If the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted." c.f. Stewart v. United States, 366 U. S. 1 (1961). Such comments not only violate the constitutionally protected right but also further protection provided by the Congress in 18 USC § 3481 which allows no presumptions to be made for the defendant's failure to testify. c.f., Griffin v. California, 380 U.S. 609 (1965); Chapman v. California, supra.

In White v. United States, ___A2d___(D. C. App.) No. 4666, decided January 8, 1969 by the D. C. Court of Appeals and reported in 97 WLR 209, a conviction was reversed due to improper comments made by the prosecutor in his closing remarks to the jury. The defendant in that case, as in this case, offered no evidence, nor did he testify. The court held that

comments such as: "you have heard nothing to the contrary," and "there has been no testimony to the contrary * * * clearly called the jury's attention to the fact that the appellant had not testified and, therefore, such comments were improper and prejudicial." The court felt that statements of this nature were so prejudicial as to be beyond cure by the court's latter instruction to the jury. Although this decision by the D. C. Court of Appeals is not binding upon this Court, the underlying rationale is consistent with the other cases cited herein.

During the trial of this case and while the prosecuting attorney was presenting his closing argument to the jury, he stated: "I ask you to consider this factor, ladies and geneltmen. Certain of - - - and this is the government's case - - is uncontradicted by any testimony, other testimony" (Tr .348). And, again, "For example, it is not contradicted that the defendant on April 7, 1967, had his hair done African bush haircut. It is not contradicted...," (Tr. 348) whereupon defense counsel interposed an objection. At bench conference, the trial judge allowed the prosecuting attorney to proceed because "any number of people could have...[testified]... without calling the defendant"(Tr. 349). and he continued: "It was uncontradicted that he had his hair in an African bush haircut this day" (Tr. 349), and, "It was not contradicted that he was smooth shaven on this date as opposed to the way he appears to you now," (Tr. 349), and again, "When you say that

this man was in the District of Columbia in the northwest section, was around the District of Columbia --- that fact was not contradicted --" (Tr. 351).

The comments of the prosecuting attorney were aimed directly at the appellant's failure to testify, and these remarks could do none other than prejudice the jury. Such prejudice in denying appellant of his constitutional and statutory right could not later be cured by the general instruction that a defendant in a criminal case need not take the witness stand.

On this point, alone, the case should be reversed, and remanded with directions to dismiss.

CONCLUSION

Wherefore, for the reasons stated above, it is respectfully submitted that the judgment of the District Court be reversed.

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Counsel for Appelant
(Appointed by this Court)

Of Counsel: John L. Hone

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief was served upon David G. Bress, Esq., United States Attorney, by leaving a copy of same at his office, U.S. Court House, 3rd and Constitution Ave., N.W., this 14th day of April, 1969.

Marvin M. Waldman

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,167

MICHAEL DALE WHORTON, APPELLANT

—vs—

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

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CR. No. 107-68

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OTHER REFERENCES

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ISSUES PRESENTED *

In the opinion of the appellee, the following issues are presented:

(1) Was the delay between the offense and the arrest of the appellant a denial of due process of law under the Fifth Amendment?

(2) Was the delay between the offense and the trial a violation of appellant's right to a speedy trial under the Sixth Amendment?

(3) Were the remarks of the prosecuting attorney in his closing arguments to the jury improper?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,167

MICHAEL DALE WHORTON, APPELLANT

—*vs*—

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 1 and 2, 1968, appellant Michael Dale Whorton was tried by a jury before District Judge John Lewis Smith, Jr., on a two count indictment charging him with armed robbery (22 District of Columbia Code, 2901, 502) of a Safeway Store located at 1731 Seventh St., N.W., Washington, D. C. The jury found appellant guilty on both counts of the indictment and he was sentenced by Judge Smith to concurrent terms of twelve (12) years on Count One and ten (10) years on Count Two under the provisions of the Federal Youth Corrections Act (18 U.S.C. 5010(c)).

Appellant's guilt was established through the testimony of two eye witnesses to the robbery, John B. Nebel, the manager of the store, and Harold S. Chichester, the store's produce manager, both of whom positively identified him as one of the holdup men.

John B. Nebel testified that on April 7, 1967, at approximately 8:45 P.M. two flashy dressed Negro males entered the Safeway store (Tr. 267). At the time he was preparing a bank deposit in the manager's office which was located in front of the store (Tr. 267). His attention was immediately focused on the men because they were very sharply dressed for the neighborhood and they were wearing sun glasses at night (Tr. 267, 274). After they entered the store he heard them conversing about buying cigarettes (Tr. 292). He went back to preparing the bank deposit and the next thing he knew the appellant was tapping a revolver on the glass portion of his office and vehemently demanding "give me the money or I will shoot you" or something like that (Tr. 268, 269). Mr. Nebel gave the appellant the money in a brown paper bag the appellant apparently had taken from one of the checkout counters (Tr. 270). The other holdup man was standing behind the appellant during the actual robbery and he also had a gun (Tr. 271). Mr. Nebel testified the appellant was a foot and a half away from him when he demanded and received the money (Tr. 272). From the time the appellant and his companion entered the store to the time he heard the gun tapping on the window, two minutes had elapsed (Tr. 274, 277). Mr. Nebel further testified he actually observed the appellant and the other holdup man for about a minute (Tr. 277). After they left the store with the money he called the police.

Harold S. Chichester testified he was working in the Safeway store at 1731 Seventh St., N.W., Washington, D. C. on April 7, 1967, at approximately 8:45 P.M. when the robbery occurred (Tr. 228). Usually, he was the store's produce manager but at the time of the robbery he was checking out a customer's order at one of the

checkout counters five or six feet from the store's entrance (Tr. 228, 229). The checkout counter is about two feet away from the manager's office (Tr. 230). He proceeded to finish the order when he heard a tapping on the manager's office and one of the holdup men say "quick, quick, quick" (Tr. 231). He turned around and saw the men and then continued bagging the customer's order (Tr. 232). At the trial he positively identified the appellant as one of the men who committed the robbery (Tr. 232, 233).

The police arrived within five minutes and Mr. Nebel told them what happened (Tr. 165, out of the presence of the jury). In addition, he testified he and Mr. Chichester were given a group of photographs at the scene of various individuals and they identified the appellant as one of the holdup men (Tr. 168, 169, out of the presence of the jury). The day following the holdup, both witnesses viewed color photographs at the Robbery Squad office and again identified the appellant as one of the holdup men from a different, and more recent photograph (Tr. 171, out of the presence of the jury). On December 12, 1967, Mr. Nebel identified the appellant as one of the robbers at a police station line-up after the appellant had been apprehended earlier for a traffic violation.

Detective Sergeant Alexander P. Fury, Metropolitan Police Department Robbery Squad, testified he responded to Mr. Nebel's call on April 7 (Tr. 282). At the scene he presented the two witnesses with 15 or 20 photographs of various robbery suspects and they tentatively identified the appellant as one of the holdup men (Tr. 104, 128, out of the presence of the jury). The next day, on April 8, they positively identified him from a more up-to-date color photograph (Tr. 131, out of the presence of the jury and Tr. 286, 287). On May 23, 1967, Detective Fury obtained a warrant for the appellant's arrest (Tr. 287). During the entire period between the offense and his procurement of the warrant, Detective Fury continued investigating the offense and also looked for the other suspect (Tr. 288).

After the warrant was obtained on May 23, 1967, Detective Fury placed a general police lookout for the appellant (Tr. 124, 125, 133, 134, out of the presence of the jury). In addition, he made a telephone check to the District Court trial docket to ascertain when the appellant was to appear in court for a prior robbery offense and was informed no date had been established (Tr. 124, 136, 137, out of the presence of the jury). The following day after the warrant was issued Detective Fury attempted to serve the appellant at his home but found no one there (Tr. 125, out of the presence of the jury). Three or four days after that he again returned to his home to serve the warrant but the appellant was not there (Tr. 125, out of the presence of the jury). The Detective talked with the appellant's mother at that time and told her he had a warrant for her son's arrest for robbery-holdup and requested her to tell the appellant to contact him at the Robbery Squad to straighten the matter out (Tr. 126, 154, out of the presence of the jury). In addition, he left his personal card with the appellant's mother.

On December 12, 1967, the appellant was arrested for a traffic violation (Tr. 182, out of the presence of the jury). At the time the appellant gave two alias to the police (Tr. 292, 293, and 109, 182, out of the presence of the jury). Because of his inability to identify himself the arresting police officer notified the Robbery Squad and Detective Fury for assistance in determining the appellant's identity (Tr. 293).

Detective Fury testified he immediately recognized the appellant when he responded to the call (Tr. 110, out of the presence of the jury) and informed the arresting officer he had a warrant charging the appellant with robbery-holdup (Tr. 110, out of the presence of the jury). He asked the appellant why he did not get in touch with him (Tr. 126, out of the presence of the jury). The appellant replied he got the message from his mother and that he knew the police were looking for him but he did not want to get locked up (Tr. 127, 143, 181,

182, 193, out of the presence of the jury). The appellant testified he had been working in Maryland between March and December 1967 for the Ace Construction Company (Tr. 203, out of the presence of the jury). Detective Fury arrested the appellant for robbery of the Safeway store at this time and also advised him there was a bench warrant for his arrest for jumping personal bond in an offense that occurred on March 21, 1967 (Tr. 140, out of the presence of the jury).

The appellant was indicted for robbery and assault with a dangerous weapon by the Grand Jury on January 21, 1968. He pleaded not guilty on February 16, 1968. On April 26, 1968, his motion to dismiss the indictment for lack of a speedy trial under the 6th Amendment or Rule 48(b) of the Federal Rules of Criminal Procedure was denied by Judge John Sirica and again denied by Judge John Lewis Smith on April 30, 1968.

The appellant did not take the stand at the jury trial or produce a defense witness on his behalf. In his closing argument, the prosecuting attorney referred to the Government's evidence as uncontradicted (Tr. 348, 349). On May 2, 1968, the jury found the appellant guilty on both Counts of the indictment.

SUMMARY OF ARGUMENT

This case, not unlike other cases that have been before this court involving the period of delay between the offense and arrest, advances no legitimate basis for reversal of the conviction. The line of decisions starting with *Ross* v. *United States*, 121 U.S. App. D.C. 233, 344 F.2d 210 (1965), which pronounced unfairness or prejudice in delay type arrest cases on which the appellant relies heavily is not present in this case because there was (1) no purposeful delay, (2) no claim by the appellant of inability to recall or reconstruct the events of the day of the offense, and (3) no trial in which the case against the appellant consisted of the recollection of witnesses whose memories were faded and refreshed by handwrit-

ten notes. Moreover, there is no evidence in the trial record of the case that because of the delay between the offense and his arrest the appellant was prejudiced and thus denied a fair trial or speedy trial in the Constitutional sense. In fact, the appellant has asserted no argument or shown any facts justifying reversal of his conviction than the mere naked claim that the delay between the offense and his trial should entitle him to a reversal of his conviction.

ARGUMENT

I

The delay between the offense and the arrest of the appellant was not a denial of due process of law under the Fifth Amendment.

In *Jackson* v. *United States*, 122 U.S. App. D.C., 124, 351 F.2d 821 (1965), this court held that prejudice will not be presumed merely because of a delay between the time of the alleged offense and the arrest of the defendant, and that the defendant is not entitled to reversal of his conviction because of delay in the absence of any attempt on his part to show that he was prejudiced by the delay. The court said:

> ". . . unless the delay is so long that prejudice can be presumed, some evidence of prejudice must be produced. It would be unreasonable to put the burden of negating prejudice on the Government, because in almost all cases the accused will have peculiar knowledge of the facts which might constitute prejudice."

Also in *Powell* v. *United States*, 122 U.S. App. D.C. 229, 352 F.2d 705 (1965), this court said that the *accused must show*, in order to invoke an exercise of the court's supervisory power, that he was prejudiced by the delay. (Emphasis added)

In this case, like *Jackson*, there is no evidence of prejudice. At no time during argument on motion or the trial

did the appellant testify, produce witnesses, claim missing witnesses, alibis, lapse of memory, or any other circumstances which had prejudiced him. To the contrary, the appellant admitted at a hearing on a *Miranda*-type motion that he knew that the police "wanted me for robbery or something" (Tr. 182, out of the presence of the jury) and that he got this message the day following the police visit to his mother's home on May 26 or 27, 1967. This was approximately a month and a half after the alleged offense and three or four days after the arrest warrant was issued. Certainly, where the appellant knows of the charges against him and that he is wanted shortly after the offense, he cannot allege unfairness or prejudice even though he was arrested seven months later. Had the appellant not been aware of the offense until his arrest on December 12, 1967, the circumstances might be different. However, this court has held a delay of four months in *Woody* v. *United States*, 125 U.S. App. D.C. 192, 370 F.2d 214 (1966), five months in *Jackson*, *supra*, nine months in *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963), *cert. denied* 379 U.S. 905, eight months in *Hardy* v. *United States*, 343 F.2d 233 (D.C. Cir. 1964), and thirteen months in *King* v. *United States*, 369 F.2d 213 (D.C. Cir. 1966), is not prejudicial or oppressive and does not violate constitutional safeguards. By contrast in this case to the decisions cited by the appellant he was given every opportunity to show or demonstrate prejudice but failed to do so. Moreover, the extent that he may have been prejudiced by the delay between the offense and his arrest is mitigated by the fact that he was aware of the charge against him and his wanted status shortly after the offense and approximately seven months before his arrest.

Nor can the appellant claim prejudice or denial of Constitutional safeguards from police inaction or inability to arrest him. While the record is silent in this case of police action to arrest appellant after May 26 or 27, 1967, this mere fact standing alone does not entitle him to a reversal of his conviction. During the period between

the alleged offense and his arrest the appellant testified he was working for a construction company in Maryland (Tr. 203, out of the presence of the jury). A bond jumping warrant had been issued for his arrest as a result of his failure to communicate with his appointed attorney in an earlier robbery case in which he was charged (Criminal No. 624-67). His conduct in this latter case and his statements in the present case that he knew the police were looking for him and that he did not want to get locked up denotes a deliberate design on his part to evade apprehension and signifies his knowledge of the charges against him. It is difficult to imagine a semblance of prejudice or claim of oppressive design of delay from these facts. It is axiomatic that where an accused asserts an affirmative ground for relief, he has the burden to go forward and prove the issue, *Jackson, supra, Williams* v. *United States*, 78 U.S. App. D.C., 147, 138, F. 2d 81, 82, Wigmore on Evidence, Vol. IX, §§ 2485, 2486. No case can be found holding a deliberate, unnecessary pre-arrest delay is a sufficient basis for reversing a conviction unless it is also shown as unreasonable and oppressive by reason of prejudice to the accused. *United States* v. *Feinberg*, 383 F.2d 60 (2d Cir., 1967). In *Jackson, supra.*, the court said an accused may show prejudice in many ways, and if he for any reason chooses not to testify on his own behalf before the jury, he may be heard by the judge without the jury's presence. The appellant here as in *Mackey* v. *United States*, 122 U.S. App. D.C. 97, 351 F.2d 794 (1965), has offered no evidence, produced no witnesses, or in any manner demonstrated prejudice to avail himself of asserted claims.

II

The delay between the offense and appellant's trial did not work a denial of his rights to a speedy trial under the Sixth Amendment.

The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to a speedy

and public trial. It is an important safeguard to minimize concern that accompanies public accusation and the possibility that a long delay will impair the accused ability to prepare his defense. *Hannahan* v. *United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965). The Amendment affects only post-arrest delays and comes into play after the accused has been arrested and publicly accused. *Powell* v. *United States*, 122 U.S. App. D.C. 229, 352 F.2d 705 (1965), *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 233 F.2d 808 (1963), *cert. denied*, 379 U.S. 905.

The Supreme Court in *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905) said "The right of a speedy trial is necessarily relative. It is consistent with delay and depends upon circumstances . . ." It is proper, therefore, to look into the circumstances in this case to determine whether the delay between appellant's arrest and trial was unreasonable or oppressive, *United States* v. *Ewell*, 383 U.S. 116, *Hedgepeth* v. *United States*, 124 U.S. App. D.C. 291, 364 F.2d 821 (1965), *King* v. *United States*, 105 U.S. App. D.C. 193, 265 F.2d 567, (1959), *cert. denied*, 359 U.S. 998.

The appellant was arrested on December 12, 1967, indicted by the Grand Jury on January 21, 1968, and finally tried by a jury on May 1 and 2, 1968. The period of time between his arrest and trial was five months. Additionally, during this time two appellant motions for dismissal for lack of speedy trial were heard and denied.

Under the circumstances the trial was set reasonably and promptly and the delay was no more than normally attributed to the ordinary processes of justice. It is important to point out once more that at no time during the trial did appellant testify, produce any witness, claim missing witnesses, or assert any other matter which had prejudiced him. The record is completely silent of any fact or claim denoting oppression in the post-arrest period. No case can be found requiring a dismissal of the indictment without some showing of oppression because of the delay. In *Smith* v. *United States*, 118 U.S. App.

D.C. 28, 331 F.2d 784, 787 (1964) the court said ". . . the authorities demonstrate that the balance between the right of public justice and those of the accused has been upset against the Government *only* where the delay has been arbitrary, purposeful, oppressive or vexatious." (Emphasis added). Without the benefit of some claim or showing on the record that the five months delay was arbitrary, purposeful, or oppressive, it is difficult to see how this case falls within the shelter of the Sixth Amendment requiring dismissal of the indictment.

Even though the total elapsed time between the offense and trial in this case was slightly more than a year, there is no evidence that the Government did not act promptly after appellant's arrest to afford him an early trial. The five months delay was partly due to appellant's motions during this period and the delay is not such so as to require the Government to show appellant's Sixth Amendment rights were not violated as suggested in *Hedgepeth* v. *United States, supra.*

III

The comment by the prosecuting attorney that the Government's evidence was not contradicted did not cast an improper inference on the appellant's right to remain silent and not testify.

There is no doubt that a prosecutor's comments to the jury on a defendant's failure to testify at a criminal trial is reversible error. This principle has received elaborate analysis in recent appellate and Supreme Court decisions, *Griffin* v. *State of California,* 380 U.S. 609 (1965). However, the rule does not prohibit all comments on testimony or evidence which stand uncontradicted, and the right to make such comments is well established. *Davis* v. *United States,* 357 F.2d 438 (1966). The test of whether there has been improper comment on the defendant's failure to testify is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be such

comment. *Knowles* v. *United States*, 224 F.2d 168 (1955), *United States* v. *Fay*, 349 F.2d 957 (1965).

Taken in part or in whole the alleged prejudicial comments by the prosecuting attorney in this case did not refer to the appellant's failure to testify directly or by reference. The statements by the prosecutor were general comments on the fact that the Government evidence was not contradicted or refuted, and only referred to the appellant's physical description (African bush haircut and smooth shaven face) and whereabouts at the time of the offense.[1]

It cannot be reasonably argued or inferred that these remarks were directed at the appellant's failure to testify. The statements were fairly directed only to the Government's evidence as not contradicted and are not objectionable as improper comment upon the appellant's failure to testify in his behalf. While there was an objection by the appellant's attorney at the time the statements were made, there was no request to charge concerning the statement or as to the appellant not taking the stand. After a brief bench discussion, the trial resumed and the prosecutor continued his remarks. Plainly,

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[1] The Government's closing statements are printed in full as follows (Tr. 348, 349, and 351):

> "I ask you also to consider this factor, ladies and gentlemen. Certain of—and this is the Government case—is uncontradicted by any testimony, or testimony.
>
> "For example, it is not contradicte that the defendant on April 7, 1967, had his hair done African bush haircut. It is not uncontradicted."
>
> At this point in the Government's closing argument the defense counsel objected to the statement. Continuing after a bench discussion—
>
> "It was not contradicted that he had his hair in an African bush haircut on this day.
>
> "It was not contradicted that he was smooth-shaven on this date as opposed to the way he appears to you now."
>
> "When you say that this man was in the District of Columbia in the Northwest section, was around the District of Columbia —that fact is not contradicted."

defense counsel knowingly and intentionally failed to save the point and led the trial judge and prosecuting attorney to understand that he was satisfied. Rule 51, Federal Rules of Criminal Procedure, *Milton* v. *United States*, 71 U.S. App. D.C. 394 F.2d 556 (1940); *Holt* v. *United States*, C.A. Cal., 272 F.2d 272 (1959); *United States* v. *Manton*, 107 F.2d 834, 2d Cir. (1939). Moreover, there was no motion for a mistrial based on the statement then or later. The issue was raised for the first time on appeal. Where improper comments are made concerning the defendant's failure to testify in his behalf a motion for a mistrial is the appropriate form and is necessary to protect his interest, *Stewart* v. *United States*, 366 U.S. 1, 10 (1961). In any event, however, the court's standardized instruction that every defendant in a criminal case has the absolute right not to testify and that the jury must not draw any inference of guilt against the defendant because he did not testify was sufficient to correct any misinterpretation that may have resulted from the comments of the Government attorney, *Melton* v. *United States, supra.*

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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